



2008. [JS 2; AR 19-29]. Plaintiff was represented by counsel during all three administrative hearings. [See AR 360-465].

The ALJ found that plaintiff had severe, medically determinable impairments consisting of diabetes mellitus with retinopathy and an affective mood disorder. The ALJ also found that plaintiff had medically determinable impairments that were not severe, namely, hypertension, controlled, with no end-organ damage; a foot ulcer secondary to diabetes mellitus; borderline intelligence; and a history of alcohol abuse, “reportedly in remission.” [AR 21-22]. The ALJ determined that plaintiff’s impairments did not meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (the “listing”). [AR 22-23]. The ALJ assessed plaintiff’s residual functional capacity (“RFC”) as follows:

[Plaintiff can] perform light work except that he is able to stand and/or walk up to four hours in an eight-hour workday or sit for eight hours in an eight-hour workday. He can occasionally climb ramps or stairs, bend, stoop, crouch, kneel, or crawl, and is precluded from work requiring balancing, work around hazardous or fast moving machinery or unprotected heights, and work requiring binocular or depth perception. [Plaintiff] can perform work involving three or four step simple repetitive tasks in an object oriented, relatively habituated work setting. [Plaintiff] should not perform work activity requiring safety operations or hypervigilance, or work that entails intense interpersonal contact with co-workers, supervisors, or the general public.

[AR 23]. The ALJ found that plaintiff’s RFC precluded him from performing his past relevant work, but did not preclude performance of jobs that exist in significant numbers in the national economy. Accordingly, the ALJ concluded that plaintiff was not disabled at any time through the date of his decision. [AR 27-28]. The Appeals Council denied plaintiff’s request for review. [AR 4-7].

### **Standard of Review**

The Commissioner’s denial of benefits should be disturbed only if it is not supported by substantial evidence or is based on legal error. Stout v. Comm’r Social Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006); Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). “Substantial evidence” means “more than a mere scintilla, but less than a preponderance.” Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). “It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)(internal quotation marks omitted). The court is required to review the record as a whole and to consider evidence detracting from the decision as well as evidence supporting the decision. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006); Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). “Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld.” Thomas, 278 F.3d at 954 (citing Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.1999)).

## Discussion

### **Listing of impairments**

The ALJ found that plaintiff did not meet or equal section 12.04 of the listing, “Affective Disorders,” or section 12.07 of the listing, “Somatoform Disorders.” [AR 22-23]. Plaintiff contends that he has valid IQ and other functional limitations that meet section 12.05 of the listing, “Mental Retardation,” and therefore that the ALJ erred in failing to find him disabled at step 3 of the sequential evaluation procedure.<sup>1</sup> [See JS 6-17].

A claimant is presumptively disabled and entitled to benefits if he or she meets or equals a listed impairment. To “meet” a listed impairment, a disability claimant must establish that his condition satisfies each element of the listed impairment in question. See Sullivan v. Zebley, 493 U.S. 521, 530 (1990); Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). To “equal” a listed impairment, a claimant “must establish symptoms, signs, and laboratory findings” at least equal in severity and duration to each element of the most similar listed impairment. Tackett, 180 F.3d at 1099-1100 (quoting 20 C.F.R. 404.1526); see Sullivan, 493 U.S. at 531.

In order to meet most of the mental disorder listings, a claimant must demonstrate the existence of

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<sup>1</sup> The Commissioner’s regulations prescribe a five-step, sequential inquiry for evaluating disability claims. See 20 C.F.R. §§ 404.1520, 416.920. The five steps are: (1) Is the claimant engaging in substantial gainful activity? (2) Does the claimant have a severe impairment? (3) Does the claimant’s impairment or combination of impairments “meet or equal” an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? (4) Is the claimant capable of performing his or her past work? (5) Is the claimant able to do alternative work that exists in significant numbers in the national economy? The inquiry stops, and the claimant is found “not disabled,” if the answer is “yes” at steps one, four, or five, or “no” at step two. An affirmative answer at step three means that the claimant is disabled. See Greger v. Barnhart, 464 F.3d 968, 971 (9th Cir. 2006); Tackett v. Apfel, 180 F.3d 1094, 1098-1099 (9th Cir. 1999).

1 impairment-related functional limitations that are incompatible with the ability to do substantial gainful  
 2 activity and that are the result of the mental disorder described in listing, which must be manifested by the  
 3 medical findings specified for that disorder. Section 12.05 does not follow that pattern. “The structure of  
 4 the listing for mental retardation (12.05) is different from that of the other mental disorders listings. Listing  
 5 12.05 contains an introductory paragraph with the diagnostic description for mental retardation. It also  
 6 contains four sets of criteria (paragraphs A through D). If [a claimant’s] impairment satisfies the diagnostic  
 7 description in the introductory paragraph and any one of the four sets of criteria, we will find that [the  
 8 claimant’s] impairment meets the listing.” 20 C.F.R. Pt. 404, Subpt. P, App.1, § 12.00A.

9 The introductory paragraph of section 12.05 states: “Mental retardation refers to significantly  
 10 subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during  
 11 the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age  
 12 22. [¶] The required level of severity for this disorder is met when the requirements in A, B, C, or D are  
 13 satisfied.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05.

14 To satisfy section 12.05B, plaintiff must have “[a] valid verbal, performance, or full scale IQ of 59  
 15 or less[.]” To satisfy section 12.05C, plaintiff must have “[a] valid verbal, performance, or full scale IQ of  
 16 60 through 70 and a physical or other mental impairment imposing an additional and significant  
 17 work-related limitation of function[.]” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05. When a claimant’s  
 18 verbal, performance, and full scale IQs differ, “the lowest of these [is used] in conjunction with 12.05.” 20  
 19 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00.6.c. While “it is preferable to use IQ measures” that “test both  
 20 verbal and performance abilities,” exceptions to this requirement may be made in “special circumstances,  
 21 such as the assessment of individuals with sensory, motor, or communications abnormalities . . . .” 20  
 22 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00.6.d.

### 23 **Plaintiff’s IQ**

24 Dr. Clifford Taylor, one of the consultative psychological examiners who evaluated plaintiff,  
 25 administered a battery of psychological tests, including the Wechsler Adult Intelligence Scale - Third  
 26 Edition (“WAIS-III”), during his examination of plaintiff on May 15, 2006. [AR 314-320]. Dr. Taylor  
 27 reported that plaintiff attained a verbal IQ of 61, a performance IQ of 60, and a full-scale IQ of 58, “placing  
 28 him in the mild to moderate range of mental retardation on a measure of cognitive functioning. His

1 intelligence is estimated to be in the low-average range.”<sup>2</sup> [AR 316-317]. Dr. Taylor’s psychological  
 2 diagnoses were depressive disorder not otherwise specified (“NOS”), and alcohol dependence, potentially  
 3 in remission. [AR 319]. He noted that plaintiff had a medical condition, diabetic retinopathy. [AR 319].

4 Dr. Taylor concluded that plaintiff’s test results were of “questionable validity.” [AR 314]. Dr.  
 5 Taylor explained:

6 Consideration is given to embellishment of cognitive disorder. It is not likely that he is  
 7 functioning in the moderate range of mental retardation. He states that he has no activities  
 8 or hobbies during the day. He failed the Rey-15 Item Memory Test - Second Edition, which  
 9 is a simple screener for malingering. He also produced an invalid MMPI-2, suggesting an  
 10 attempt to present himself in an overly disturbed manner. He slurred his words, stared off,  
 11 and appeared to be very disinterested in the testing. He was prodded continually to give  
 12 effort to his ability, which did not improve his behaviors.

13 [AR 319]. Dr. Taylor opined that plaintiff had a moderate impairment in his ability to maintain attention,  
 14 concentration, and pace, and a mild impairment in his ability to understand, remember, and carry out job  
 15 instructions; interact with supervisors, coworkers, and the public; and adapt to day to day activities,  
 16 including attendance and safety. [AR 319].

17 During the February 2007 administrative hearing, plaintiff testified that he finished the eighth grade  
 18 and attended special education classes. [AR 410-411]. The medical expert, Dr. Soltz, testified that

19 The big problem I have is the 12.05 issue, and unfortunately we have an invalid and thought  
 20 to be malingering attempt at presenting himself on May 15 [2006]. If nothing else it was sub-  
 21 maximal effort. . . . The question now arises if he does have a history of being a special class  
 22 placement perhaps his IQ of 58 might be somewhere near what it is, but that’s a pretty low  
 23 IQ, [and] . . . malingering and/or a lack of effort or basic indifference to the procedure was

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 25 <sup>2</sup> “In general an IQ of 70 or below indicates mental retardation (mild = 50/55-70; moderate  
 26 = 35/40-50/55; severe = 20/25-35/40; profound = below 20/25); an IQ of 70-85 signifies borderline  
 27 intellectual functioning.” Stedman’s Medical Dictionary retardation (27th ed. 2000); see also Brown  
 28 v. Sec’y of Health & Human Servs., 948 F.2d 268, 270 (6th Cir. 1991)(noting that “[t]he Diagnostic  
 and Statistical Manual of Mental Disorders (3d ed. 1987) (‘DSM-III-R’) distinguishes between four  
 degrees of severity of intellectual impairment: mild, moderate, severe, and profound. I.Q. levels in  
 the range of ‘50-55 to approx. 70’ are labeled as ‘Mild Mental Retardation.’”).

1 assessed during the evaluation.

2 [AR 415]. Dr. Soltz also noted that plaintiff testified that he stopped drinking in September 2006, but he was  
3 still drinking when he was evaluated by Dr. Taylor in May 2006, and “that could’ve possibly caused some  
4 deficiencies in [his] performance. That’s for sure.” [AR 416].

5 Echoing these concerns about the validity of the test results obtained by Dr. Taylor, the ALJ  
6 continued the hearing, ordered a second consultative examination, and asked plaintiff’s attorney to try to  
7 obtain plaintiff’s educational records. [See AR 416-419]. The ALJ also explained to plaintiff that “these  
8 tests have what we call validity scores in them, which basically means in many cases they can tell whether  
9 you’re giving a best effort or whether you’re just goofing off and you’re not trying.” [AR 419]. The ALJ  
10 further admonished plaintiff that if he did not make his best effort, the test scores would

11 come back way out of balance . . . [¶] So I’m going to warn you right now that these tests  
12 can tell me whether or not you’re giving a good example or good effort, and if you don’t  
13 give a good effort that’s not going to impress me. . . . [¶] You need to be honest on these tests  
14 and give them your best effort, and you’d be surprised what they can say. They may not hurt  
15 your case at all by giving you best effort. By giving your best effort they may help your  
16 case, but I can’t tell you that unless you’re honest with me and with the examiner . . .

17 [AR 420]. Plaintiff said that he understood. [AR 420-421].

18 The Commissioner’s second consultative examiner, Dr. Cash, evaluated plaintiff in June 2007. [AR  
19 333-338]. He wrote that plaintiff was “cooperative. He exhibited sufficient attention to test materials and  
20 attempted to answer all questions he was presented with sufficient effort. Modifications were made to the  
21 testing due to reported . . . vision problems. The remaining results are valid and interpretable.” [AR 334].  
22 Plaintiff recalled 12 items on the Rey 15 II test, a result that Dr. Cash described as “not consistent with an  
23 attempt to malingering or dissimulate.” [AR 335]. On the WAIS-III, which was “[m]odified due to vision  
24 problems,” plaintiff attained a verbal IQ of 63, placing him in the “extremely low” range. [AR 336]. The  
25 “90% confidence interval” was 60-68.<sup>3</sup> [AR 336]. Plaintiff “performed poorly on all subtests indicating

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27 <sup>3</sup> A “confidence interval” is used to indicate the reliability of a point estimate of a parameter.  
28 The confidence interval is a range of values above and below a point estimate and within which the  
parameter is estimated to lie. The confidence interval is qualified by a confidence level, generally

1 deficits in verbal conceptualization, knowledge, and expression as well as number ability and sequential  
 2 processing.” [AR 336]. Plaintiff’s MMPI-2 score “indicates he is depressed and having a very difficult time  
 3 adjusting to his health problems but is not openly aware of acknowledging these difficulties. He is in a fair  
 4 amount of distress but is in apparent denial about it. He is not attempting to exaggerate his deficits at this  
 5 time.” [AR 337].

6 Dr. Cash diagnosed depressive disorder NOS, learning disorder NOS, rule out borderline intellectual  
 7 functioning. [AR 337]. Dr. Cash opined that plaintiff was moderately impaired in his ability to tolerate  
 8 stress, mildly to moderately at risk of emotional deterioration in the workplace, and mildly impaired in his  
 9 ability to understand, remember, and carry out simple job instructions; maintain attention, concentration,  
 10 and pace; and get along with supervisors and coworkers. [AR 337].

11 A supplemental hearing was conducted in November 2007. Asked by the ALJ about the  
 12 applicability of section 12.05 of the listing, Dr. Soltz said that plaintiff has “borderline intellectual  
 13 functioning, which is not mental retardation. It will not meet any listings . . . .” [AR 429-430]. Dr. Soltz  
 14 testified that he “would probably add [a limitation to] simple and repetitive tasks” to plaintiff’s RFC “based  
 15 upon that assessment of [plaintiff’s] IQ. It’s just hard to know what his IQ is.” [AR 431]. Later, Dr. Soltz  
 16 clarified that plaintiff “would have definite difficult[y] dealing with instructions and no greater than simple.”  
 17 [AR 431]. The ALJ asked Dr. Soltz whether “simple instructions and simple repetitive tasks” meant “one-  
 18 step tasks.” [AR 439]. Dr. Soltz replied, “I think three or four. . . [T]hat’s what I think he’s capable of doing  
 19 based upon the record. . . . [H]e should be able to do three and four step tasks with a borderline IQ.” [AR  
 20 439].

21 The ALJ ultimately found that plaintiff had a medically determinable impairment, specifically,  
 22 “borderline intelligence.” The ALJ found that plaintiff’s borderline intelligence was not a severe  
 23 impairment when considered independently. [AR 21-22]. Nonetheless, the ALJ adopted Dr. Soltz’s

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25 expressed as an estimate. A 90% confidence interval means that the investigator is 90% confident  
 26 that the true estimate lies within the confidence interval. See Wikipedia, Confidence interval, at  
 27 [http://en.wikipedia.org/wiki/Confidence\\_interval](http://en.wikipedia.org/wiki/Confidence_interval) (last visited Feb. 3, 2010); United States National  
 28 Library of Medicine - National Institutes of Health, National Information Center on Health Services  
 Research and Health Care Technology, Health Technology Assessment (“HTA”) 101: Glossary, at  
<http://www.nlm.nih.gov/nichsr/hta101/ta101014.html> (last visited Feb. 3, 2010).



1 testimony that plaintiff's IQ would limit him to simple, repetitive tasks of no more than four steps, and he  
2 expressly incorporated that restriction into his RFC finding. [AR 21-22]. Thus, notwithstanding his finding  
3 at step two, the ALJ implicitly found that plaintiff's "borderline intelligence" had more than a minimal  
4 effect on his ability to work. See Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2006)(explaining that a  
5 medically determinable impairment or combination of impairments may be found "not severe only if the  
6 evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability  
7 to work.")(quoting Smolen v. Chater 80 F.3d 1273, 1290 (9th Cir. 1996)). The ALJ made no specific  
8 findings regarding plaintiff's IQ.

9 To meet the "B" criteria of section 12.05, plaintiff must have a valid verbal, performance, or full-  
10 scale IQ of 59 or below. Both Dr. Taylor, who administered the WAIS-III that yielded a full-scale IQ of  
11 58, and Dr. Soltz, the medical expert, indicated that those IQ test results were invalid due to suboptimal  
12 effort or malingering on plaintiff's part. Therefore, plaintiff's contention that he meets the "B" criteria of  
13 section 12.05 lacks merit. See Soto v. Sec'y of Health & Human Servs., 795 F.2d 219, 222 (1st Cir.  
14 1986)(holding that the ALJ is not obliged to accept an IQ "if there is a substantial basis in the record for  
15 believing that [the] claimant was feigning the results").

16 To meet the "C" criteria of section 12.05, plaintiff must have "[a] valid verbal, performance, or full  
17 scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant  
18 work-related limitation of function[.]" 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05C. As explained above,  
19 Dr. Cash, the consultative examiner, reported that plaintiff attained a verbal IQ of 63 on the WAIS-III, with  
20 a "confidence interval" of 60-68, within the range of 60-70 contemplated by section 12.05C. [AR 336]. His  
21 examination report does not support the inference that plaintiff's IQ test results were invalid or feigned. To  
22 the contrary, Dr. Cash commented that plaintiff was cooperative and put forth sufficient attention and effort,  
23 and he characterized plaintiff's IQ test results as "valid and interpretable." [AR 334]. When questioned  
24 about Dr. Cash's IQ test results, Dr. Soltz said that there was "likely sub-maximal effort" by plaintiff, and  
25 that he considered plaintiff's scores on the MMPI and the Rey 15 II test "suspicious." [AR 431]. On cross-  
26 examination by plaintiff's attorney, however, Dr. Soltz acknowledged that "there is no evidence from [Dr.  
27 Cash] himself" indicating that plaintiff made sub-maximal effort, and that Dr. Cash "did not say that." [AR  
28 434]. While Dr. Soltz characterized plaintiff's Rey 15 II and MMPI-2 test results as "suspicious," Dr. Cash



1 vouched for their reliability. He specifically stated that plaintiff's Rey 15 II test results (12 out of a possible  
2 15) were not consistent with malingering or dissimulation, and that plaintiff did not exaggerate his deficits  
3 when taking the MMPI-2. [AR 335-337].

4 Citing Dr. Taylor's report, the ALJ noted that "[p]revious test results were proven invalid due to  
5 malingering or sub-optimal effort and there is no evidence of record to suggest his performance during  
6 recent testing is indicative of an inability to perform simple repetitive tasks in the workplace." [AR 22.] The  
7 ALJ said that he gave "significant, but not total weight" to Dr. Cash's examination report, and "great  
8 weight" to Dr. Soltz's testimony. [AR 26]. Although plaintiff's IQ test results from both Dr. Taylor and Dr.  
9 Cash and the application of section 12.05 were addressed during the administrative hearings, the ALJ never  
10 explicitly addressed those issues in his decision. The ALJ's silent disregard of the verbal IQ obtained by  
11 Dr. Cash was error. See Lester v. Chater, 81 F.3d 821, 830-831 (9th Cir. 1995) (stating that an examining  
12 physician's opinion can be rejected only for specific and legitimate reasons based on substantial evidence  
13 in the record, and "[t]he opinion of a nonexamining physician cannot by itself constitute substantial  
14 evidence that justifies the rejection of the opinion of either an examining physician or a treating physician");  
15 cf. Fanning v. Bowen, 827 F.2d 631, 633-634 (9th Cir. 1987)(reversing and remanding for consideration  
16 of whether the claimant met section 12.05 where the claimant's IQs "obtained during psychological testing  
17 by two clinical psychologists ranged from a high of 76 to a low of 69, thereby satisfying the first prong of  
18 section 12.05(C)")(footnote omitted); Williams v. Sullivan, 970 F.2d 1178, 1184 (3d Cir. 1992)(stating that  
19 "a valid verbal scale IQ test administered by a qualified professional using the WAIS may be sufficient to  
20 establish" mental retardation under the first prong of section 12.05C).

21 Defendant does not contend that the verbal IQ of 63 obtained by Dr. Cash was invalid, or that the  
22 ALJ adequately explained why he ignored that score.<sup>4</sup> Instead, defendant argues that the ALJ properly  
23 relied on Dr. Soltz's testimony and other evidence suggesting that plaintiff had "mild functional limitations  
24 [that] did not equal" any listing. [JS 12-13]. Defendant's argument lacks merit.

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26 <sup>4</sup> Defendant cites the Appeals Council's decision denying review, which explained why the  
27 Appeals Council concluded that no change was warranted in the ALJ's decision. [AR 4-7]. Because  
28 the Appeals Council denied plaintiff's request for review, the ALJ's decision is the Commissioner's  
final decision in this case, and only that decision is subject to judicial review. See 42 U.S.C. §  
405(g). The Appeals Council's decision cannot remedy legal defects in the ALJ's decision.

1 Because section 12.05 is structured differently than the other mental disorder listings, a claimant can  
 2 meet the “A” through “C” criteria (but not the “D” criteria) without having to demonstrate a disabling, or  
 3 even severe, level of mental functional impairment. See 20 C.F.R. Pt. 404, Subpt. P, App.1, §§ 12.00A,  
 4 12.05C. Therefore, the ALJ cannot disregard a valid IQ simply because other evidence in the record could  
 5 support a finding of nondisability in the absence of such a score.

6 In an analogous Ninth Circuit case, the claimant contended that she met section 12.05C of the listing.  
 7 She had IQs in the 60-70 range, and the doctor who administered the IQ test “specifically stated that the ‘test  
 8 results were a valid reflection of [the claimant’s] current level of intellectual functioning.” Thresher v.  
 9 Astrue, 283 Fed.Appx. 473, 475 & n.5 (9th Cir. Jun. 19, 2008). The Ninth Circuit observed:

10 Here the ALJ did suggest that [the claimant] was not functionally mentally retarded, but the  
 11 ALJ’s failure to reference § 12.05 and, in particular, Listing 12.05C makes it unclear whether  
 12 the ALJ came to grips with the specific requirements of that section when she issued her  
 13 decision. We do not doubt that an ALJ can decide that an IQ score is invalid. The  
 14 regulations’ inclusion of the word “valid” in Listing 12.05C makes the ALJ’s authority clear.  
 15 But here, while the ALJ pointed to the level of [the claimant’s] functioning, she did not find  
 16 that the score was invalid, and the listing does not speak to functioning--it speaks only to the  
 17 IQ score itself. Thus, we remand to the Commissioner for clarification regarding the nature  
 18 of the considerations applied at step 3 and, particularly, precisely what was decided and why.

19 Thresher, 283 Fed.Appx. at 475 (footnote omitted).

20 The Ninth Circuit also noted that it had “never decided what information is appropriately looked to  
 21 in deciding validity,” but that some courts have said that a score can be questioned on the basis of “other  
 22 evidence” (without, however, explaining “exactly how other evidence impacts the validity of the score  
 23 itself”), and that other courts require “some empirical link between the evidence and the score.” Thresher,  
 24 283 Fed.Appx. at 475 n.6 (citations omitted). Thresher left that issue unresolved, but it suggests, at a  
 25 minimum, that an ALJ should not find that “other evidence” renders an IQ invalid without explaining how  
 26 that evidence impacts the validity of the score.

27 Defendant’s contentions do not excuse the ALJ’s silent disregard of plaintiff’s verbal IQ of 63. First,  
 28 the absence of a diagnosis of “mental retardation” does not preclude plaintiff from meeting section 12.05C

1 or invalidate his IQ of 63. [JS11-13; see AR 335, 429]. Section 12.05 does not require a diagnosis or finding  
 2 of “mental retardation,” but relies instead on valid IQs in conjunction with other evidence to establish  
 3 “subaverage general intellectual functioning.” See SSR 83-19, 1983 WL 31248, at \*2 (“A finding that an  
 4 impairment meets the listing will not be justified on the basis of a diagnosis alone.”).<sup>5</sup> see also Christner v.  
 5 Astrue, 498 F.3d 790, 793 (8th Cir. 2007)(“[A] formal diagnosis of mental retardation is not required to fall  
 6 within the confines of section 12.05. . . . The ALJ erred in giving any credence to the lack of a diagnosed  
 7 mental deficiency in [this] case.”).

8 Defendant’s argument that plaintiff had a “semiskilled” work history that is not consistent with his  
 9 IQ is contrary to the evidence as a whole. [See JS 11]. Based on plaintiff’s disability reports and testimony,  
 10 the vocational expert testified that plaintiff worked as: (1) a “labor landscaper,” Dictionary of Occupational  
 11 Titles (“DOT”) job number 408.687-014, from 1994-1995; (2) an “assembler, electrical accessories I,” DOT  
 12 job number 729.687-010, from 1996-1997; and (3) an “assembler, production line,” DOT job number  
 13 809.684-010, from 1997-2001. [AR 146, 447-448; see 115, 120, 142, 444-447].

14 Plaintiff testified that his landscaping job involved using a trenching tool to “make holes in the  
 15 grass.” [AR 444-445]. His earnings record indicates that he performed that job in 1994 and made \$1,107.

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 17 <sup>5</sup> Because there are degrees of mental retardation, the functional difference between mild  
 18 mental retardation and borderline intellectual functioning (which generally corresponds to an IQ  
 19 over 70) will not be as pronounced as with more severe mental retardation. As explained by the  
 20 Sixth Circuit,

21 Mild Mental Retardation is roughly equivalent to what used to be referred to as the  
 22 educational category of “educable.” This group constitutes the largest segment of  
 23 those with the disorder-about 85%. People with this level of Mental Retardation  
 24 typically develop social and communication skills during the preschool years (ages  
 25 0-5), have minimal impairment in sensorimotor areas, and often are not  
 26 distinguishable from normal children until a later age. By their late teens they can  
 27 acquire academic skills up to approximately sixth-grade level; during their adult  
 28 years, they usually achieve social and vocational skills adequate for minimum  
 self-support, but may need guidance and assistance when under unusual social or  
 economic stress. At the present time, virtually all people with Mild Mental  
 Retardation can live successfully in the community, independently or in supervised  
 apartments or group homes (unless there is an associated disorder that makes this  
 impossible).

Brown, 948 F.2d at 270 (quoting the DSM-III-R).

1 [AR 115]. The ALJ did not include that job in his past relevant work finding. [AR 27].

2 Plaintiff said that he worked as an “electrical assistant” for “Danny Lamas” from 1996-1997, but  
3 he did not have reported earnings from that job. [AR 115, 142]. In response to a question by the vocational  
4 expert about the heaviest weight he had to lift in that position, he testified that he had to lift and carry wires  
5 for that job, but he did not describe that job further in his testimony or vocational reports. [AR 446-447].  
6 The vocational expert classified that job as an electrical accessories assembler position. [AR 146, 447-448].

7 Plaintiff reported that from 1997 until 2001, he worked as an “assembly line worker/machine  
8 operator” for a company that manufactured truck windows. [AR 120]. His job involved “[c]utting materials  
9 for window frames.” [AR 120]. Plaintiff testified that he “used to put the latches on the – I used to make  
10 windows for the trucks that were the Nissan, Silverado, Tacoma, the back window, the little one.” [AR 447].  
11 Plaintiff testified that he obtained that job through his brother-in-law.<sup>6</sup> His last two jobs involved working  
12 for his brother-in-law’s brother.<sup>7</sup> He said that he got another job through (or from) his cousin’s husband.  
13 [AR 413]. Plaintiff testified that he was fired for “missing too many days,” first because his mother died,  
14 and because he started having problems with his eyes. [AR 413-414].

15 The DOT classifies the jobs of “laborer, landscape” and “assembler, electrical accessories I” as  
16 requiring a “Specific Vocational Preparation” (“SVP”) of “Level 2,” defined as “[a]nything beyond short  
17 demonstration up to and including 1 month.”<sup>8</sup> Those jobs also require “Level 2” reasoning development,  
18 which is defined as the ability to “[a]pply commonsense understanding to carry out detailed but uninvolved  
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20 <sup>6</sup> Plaintiff’s testimony and disability reports establishes that he lived with his sister and her  
21 family for 19 years. [AR 249, 316, 334, 367, 390-391].

22 <sup>7</sup> Plaintiff’s earning report indicates that except for earnings of \$322 from “Corporate  
23 Personnel Network, Inc.” in 2000, all of plaintiff’s earnings from 1996 through 2001 came from one  
24 employer, C.R. Laurence Co. Inc. [AR 115-116].

25 <sup>8</sup> “Specific Vocational Preparation” means “the amount of lapsed time required by a typical  
26 worker to learn the techniques, acquire the information, and develop the facility needed for average  
27 performance in a specific job-worker situation.” DOT, Appendix C, Components of the Definition  
28 Trailer (4th ed. rev.1991). “The DOT lists a specific vocational preparation (SVP) time for each  
described occupation. Using the skill level definitions in 20 C.F.R. 404.1568 and 416.968, unskilled  
work corresponds to an SVP of 1-2; semiskilled work corresponds to an SVP of 3-4; and skilled  
work corresponds to an SVP of 5-9 in the DOT.” SSR 00-4p, 2000 WL 1898704, at \*3

1 written or oral instructions. Deal with problems involving a few concrete variables in or from standardized  
 2 situations.”<sup>9</sup> The DOT job of “assembler, production line” also requires Level 2 reasoning development,  
 3 but it requires an SVP of 3, defined as “[o]ver 1 month up to and including 3 months.”

4 Plaintiff’s job as a production line assembler is considered semiskilled in the DOT, but the record  
 5 is ambiguous as to whether plaintiff’s job as actually performed was semiskilled. That distinction matters  
 6 here, because defendant is arguing that an inconsistency exists between plaintiff’s actual performance of  
 7 past work and his IQ. Moreover, the production line assembly job, like all of plaintiff’s prior jobs, is  
 8 classified by the DOT as involving very limited reasoning skills. Therefore, it is not inconsistent with a low  
 9 level of intellectual functioning.

10 In addition, plaintiff’s work history was not extensive. He was 39 years old when the ALJ issued  
 11 his decision. The evidence of record indicated that he had worked for a total of about seven years, and had  
 12 been terminated from his last job some seven years before the ALJ issued his decision. [See AR 115-116,  
 13 142]. Plaintiff’s uncontroverted testimony was that he either obtained those jobs with the assistance of  
 14 relatives or actually worked for relatives. Thus, the record as a whole does not support defendant’s  
 15 contention that plaintiff’s work history is materially inconsistent with an IQ signifying mild mental  
 16 retardation. See Christner, 498 F.3d at 794 (holding that the claimant’s intermittent work history as a tree  
 17 trimmer supported his IQ); Bailey v. Apfel, 230 F.3d 1063, 1065 (8th Cir. 2000)(holding that the ALJ erred  
 18 in rejecting the IQ of a claimant whose “work history was limited primarily to working for his father”);  
 19 Brown, 948 F.2d at 270 (holding that the claimant’s ability to log mileage, hours worked, and the places he  
 20 drove in his job as a truck driver were not inconsistent with a valid IQ of 68); see generally Fanning, 827  
 21 F.2d at 634 (recognizing that if plaintiff otherwise meets section 12.05C, he “must be found disabled”  
 22 without consideration of his work history as a laundry loader, janitor, and dishwasher); cf. Williams, 970  
 23 F.2d at 1185 (holding that where the claimant had worked for 22 years in a steel drum factory and as a  
 24 security guard for about a year, the claimant’s ability “to maintain a job for most of his adult life” called his

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26 <sup>9</sup> DOT job classifications include a “General Educational Development” (“GED”) component  
 27 comprising three scales: Reasoning Development, Math Development, and Language  
 28 Development. The GED reasoning, math, and language development scales range from Level 1  
 (low) to Level 6 (high). See DOT, App. C.

1 mental retardation into doubt).

2 Defendant also argues that plaintiff's educational history and school records are inconsistent with  
3 his IQ. That argument also lacks merit. Plaintiff testified that he finished eighth grade. He dropped out in  
4 ninth grade because he started "hanging out" with friends and "didn't really like" school. [AR 367-368, 386-  
5 387]. Plaintiff testified that he never obtained any other education or job training, and he did not get his  
6 GED. [AR 368]. Plaintiff's Los Angeles school records were submitted to the Appeals Council. [AR 352-  
7 359]. In a section of plaintiff's school records labeled "Summary of Observations of Educational Growth  
8 and Development [AR 354], plaintiff's first-grade teacher commented that plaintiff was "learning English  
9 slowly," could do math "fairly well," and "cannot read at all." His second-grade teacher said that plaintiff  
10 had made "slow progress in reading," and that she sent him to a first grade class because he needed  
11 "continual alphabet review." His math comprehension was "average." The teacher recommended diagnostic  
12 testing. [AR 354].

13 In fourth grade, plaintiff "was so far behind that I had him tested for possible special class  
14 placement. I hope that this is more suitable for him. He has difficulty relating with peers." Plaintiff was  
15 administered the Wide Range Achievement Test ("WRAT"), which measures reading recognition, spelling,  
16 and arithmetic computation. [AR 354; JS 7 n.2]. As a fourth-grader, plaintiff tested at grade levels 1.3, 1.1,  
17 and 3.0 in the three areas measured. Shortly after that test was administered, an Individual Educational Plan  
18 ("IEP) was written and approved. The nature of the IEP and whether or how it was implemented cannot  
19 be ascertained from the record; however, plaintiff testified that he had attended special education classes.  
20 [AR 411]. Plaintiff's fifth-grade teacher said that plaintiff was making "some progress" in reading and math.  
21 Plaintiff took the WRAT again in fifth grade. He tested at grade levels 2.4, 1.9, and 3.5 in the three areas  
22 measured. [AR 354]. In 1978, when plaintiff was 10 years old, a school official noted that he did not know  
23 how to write his last name. A recommendation was made for academic evaluation. [AR 358]. Plaintiff's  
24 sixth-grade teacher noted that plaintiff's school work was about fourth grade level. He had "trouble with  
25 children" and "does not follow school rules." [AR 354].

26 Plaintiff's testimony about his educational history and his school records do not provide substantial  
27 evidence for ignoring or rejecting his verbal IQ of 63. See Christner, 498 F.3d at 792, 794 (holding that the  
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1 record “did not belie” the claimant’s IQ of 58 where he attended special education classes, did not live  
2 independently, and “dropped out of school at a low grade” (either in the sixth or eighth grade)); Markle v.  
3 Barnhart, 324 F.3d 182, 183-184, 187 (3d Cir. 2003)(holding that the record was not inconsistent with  
4 mental retardation meeting section 12.05 where the claimant dropped out in tenth grade, obtained a GED,  
5 and could read, write, add, and subtract, but had problems with multiplication and division); Bailey, 230  
6 F.3d at 1065-1066 (holding that the ALJ erred in rejecting the IQ of a claimant who had been diagnosed  
7 with a learning disability and had taken special education classes in school); Brown, 948 F.2d at 269-270  
8 (holding that completing sixth grade and a limited ability to read were not inconsistent with a valid IQ score  
9 of 68).

10 In addition, plaintiff’s testimony and school records satisfy the requirement that plaintiff have  
11 manifested deficits in adaptive functioning “during the developmental period; i.e., the evidence  
12 demonstrates or supports onset of the impairment before age 22.” 20 C.F.R. Pt. 404, Subpt. P, App. 1,  
13 section 12.05. “The requirement of early onset and the reference to the claimant’s ‘developmental period’”  
14 in the introductory paragraph of section 12.05 “seem intended to limit coverage to an innate condition,  
15 rather than a condition resulting from a disease or accident in adulthood.” Novy v. Astrue, 497 F.3d 708,  
16 709 (7th Cir. 2007)(citation omitted). IQ tests or other contemporary evidence of mental retardation prior  
17 to age 22 is not required to establish onset before that age. Rather, the record “should contain some  
18 evidence” that permits an inference that the impairment existed before age 22 and is not of recent origin due  
19 to a traumatic event or some other changed circumstance. Markle, 324 F.3d at 188-189.

20 Nothing in the record suggests that plaintiff’s subaverage intellectual functioning was of recent  
21 origin. Evidence regarding his educational history before age 22 permits the inference that his mental  
22 retardation had an onset date during the developmental period. See Christner, 498 F.3d at 793 (holding that  
23 “circumstantial evidence” existed supporting manifestation of the claimant’s mental retardation before age  
24 22, “including [the claimant’s] low-grade dropout and participation in prior special education classes”);  
25 Markle, 324 F.3d at 189 (holding that evidence that the claimant took special education classes through the  
26 ninth grade, dropped out in tenth grade, “struggled” to obtain a GED, and had a limited work history  
27 supported a finding that onset of mental retardation occurred before age 22); Maresh v. Barnhart, 438 F.3d  
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897, 900 (8th Cir. 2006)(holding that the ALJ erred in finding that the claimant's mental retardation did not manifest itself before age 22 where the claimant attended special education classes, dropped out of school in ninth grade, had "trouble with reading, writing, and math," and had "frequent fights with other children").

For the reasons described above, the ALJ committed legal error in failing properly to evaluate whether plaintiff's mental impairment satisfied the introductory paragraph of 12.05 and the first prong of section 12.05C.

#### **Additional and significant work-related limitation of function**

To satisfy the second prong of section 12.05C, plaintiff must have "a physical or other mental impairment imposing an additional and significant work-related limitation of function." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05; see Hinkle v. Apfel, 132 F.3d 1349, 1352 (10th Cir. 1997)("[T]he purpose of § 12.05C is to compensate a claimant with an IQ in the 60-70 range and a limitation of function that affects his work.")(quoting Sird v. Chater, 105 F.3d 401, 403 n.6 (8th Cir. 1997)). Following several other circuit courts, the Ninth Circuit has held that "an impairment imposes a significant work-related limitation of function when its effect on a claimant's ability to perform basic work activities is more than slight or minimal." Fanning, 827 F.2d at 633 (citing Pullen v. Bowen, 820 F.2d 105, 109 (4th Cir.1987); Cook v. Bowen, 797 F.2d 687, 690 (8th Cir.1986); Nieves v. Sec'y of Health & Human Servs., 775 F.2d 12, 14 (1st Cir.1985); and Edwards by Edwards v. Heckler, 755 F.2d 1513, 1515 (11th Cir.1985)). The Ninth Circuit "emphasize[d] . . . that a finding of severity is not required to satisfy the more than slight or minimal effect standard." Fanning, 827 F.2d at 633 n.3 (citing Edwards, 755 F.2d at 1515) (stating that a "significant" work-related limitation of function involves something more than "minimal" but less than "severe"). If the claimant has an additional physical or mental impairment "which was itself severe," that impairment "automatically satisfie[s] the more than slight or minimal effect standard." Fanning, 827 F.2d at 633 n.3 (citing Nieves, 775 F.2d at 14).

After Fanning was decided, the Commissioner revised the regulations pertaining to the evaluation of mental disorders to clarify that for purposes of applying section 12.05C,

we will assess the degree of functional limitation the additional impairment(s) imposes to determine if it significantly limits your physical or mental ability to do basic work activities,

1 i.e., is a “severe” impairment(s), as defined in §§ 404.1520(c) and 416.920(c). If the  
 2 additional impairment(s) does not cause limitations that are “severe” as defined in §§  
 3 404.1520(c) and 416.920(c), we will not find that the additional impairment(s) imposes “an  
 4 additional and significant work-related limitation of function” . . . .

5 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A; see Markle, 324 F.3d at 188 (discussing the revised  
 6 regulations); see also Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury,  
 7 65 Fed.Reg. 50746, 50772 (Aug. 21, 2000).

8 The ALJ found that plaintiff had severe physical and mental impairments consisting of diabetes  
 9 mellitus with retinopathy and an affective mood disorder. [AR 21-22]. Therefore, under both Ninth Circuit  
 10 law and the Commissioner’s newer, more demanding regulatory standard, plaintiff has “a physical or other  
 11 mental impairment imposing an additional and significant work-related limitation of function” within the  
 12 meaning of section 12.05.<sup>10</sup> See Fanning, 827 F.2d at 633 n.3; see also Markle, 324 F.3d at 188 (holding  
 13 that “[e]ven absent the Commissioner’s clarifying regulation, the severity of [the claimant’s] other  
 14 impairments (obstructive pulmonary disease, hypertension, obesity and gout) which limit him to some forms  
 15 of light work constitute impairments ‘imposing additional and significant work-related limitations of  
 16 function’”); Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985) (holding that the second prong of the “C”  
 17 criteria in section 12.05 was satisfied where the claimant was limited to light or sedentary work).

18 For all of the foregoing reasons, the ALJ’s step-three finding that plaintiff did not meet or equal a  
 19 listed impairment was not based on substantial evidence and is not free of legal error.

## 20 **Remedy**

21 The choice whether to reverse and remand for further administrative proceedings, or to reverse and  
 22 simply award benefits, is within the discretion of the court. See Harman v. Apfel, 211 F.3d 1172, 1178 (9th  
 23 Cir.) (holding that the district court’s decision whether to remand for further proceedings or payment of  
 24 benefits is discretionary and is subject to review for abuse of discretion), cert. denied, 531 U.S. 1038  
 25 (2000). The Ninth Circuit has observed that “the proper course, except in rare circumstances, is to remand  
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27 <sup>10</sup> This fortuity makes it unnecessary to decide whether Fanning remains good law after the  
 28 Commissioner’s 2000 clarification of the regulations.

1 to the agency for additional investigation or explanation.” Moisa v. Barnhart, 367 F.3d 882, 886 (9th Cir.  
 2 2004) (quoting INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam)). A district court, however,  
 3 should credit evidence that was rejected during the administrative process and remand for  
 4 an immediate award of benefits if (1) the ALJ failed to provide legally sufficient reasons for  
 5 rejecting the evidence; (2) there are no outstanding issues that must be resolved before a  
 6 determination of disability can be made; and (3) it is clear from the record that the ALJ  
 7 would be required to find the claimant disabled were such evidence credited.

8 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004) (citing Harman, 211 F.3d at 1178). The Harman test  
 9 “does not obscure the more general rule that the decision whether to remand for further proceedings turns  
 10 upon the likely utility of such proceedings.” Harman, 211 F.3d at 1179; see Benecke, 379 F.3d at 593  
 11 (noting that a remand for further administrative proceedings is appropriate “if enhancement of the record  
 12 would be useful”).

13 The ALJ failed to provide legally sufficient reasons for rejecting the verbal IQ of 63 obtained by Dr.  
 14 Cash. There are no outstanding issues that must be resolved before a determination of disability can be  
 15 made, because the record establishes that as of the date his valid IQ was assessed by Dr. Cash, plaintiff met  
 16 all of the criteria for disability under section 12.05C of the listing. Since it is clear from the record that the  
 17 ALJ would be required to find plaintiff disabled if that evidence were credited, the proper remedy is a  
 18 remand for the payment of benefits.<sup>11</sup>

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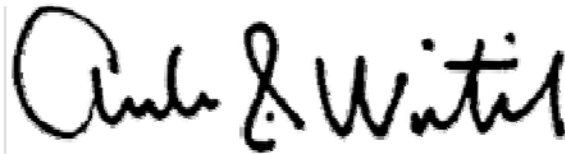
## 22 Conclusion

23 For the reasons stated above, the ALJ's decision is not supported by substantial evidence and does  
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 27  
 28 <sup>11</sup> This disposition makes it unnecessary to consider plaintiff's remaining contentions.

1 not reflect application of the proper legal standards. Accordingly, defendant's decision is reversed, and the  
2 case is remanded for an award of benefits consistent with this memorandum of decision.

3  
4 February 10, 2010

A handwritten signature in black ink, reading "Andrew J. Wistrich". The signature is written in a cursive, flowing style. The first name "Andrew" is written with a large, looped 'A'. The middle initial "J." is small and follows the first name. The last name "Wistrich" is written with a large 'W' and a trailing flourish.

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7 ANDREW J. WISTRICH  
United States Magistrate Judge  
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